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Case Western University School of Law

International War Crimes Project

Rwanda Genocide Prosecution

(In conjunction with the New England School of Law)

Memorandum for

The Office of the Prosecutor

Issue:

The degree of corroboration required for a witness' testimony

to be considered credible by the Trial Chamber.

Prepared by:

Patricia Wedding

November 29, 2001

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue:

The degree of corroboration required for a witness' testimony to be regarded as credible by the Trial Chamber of the International Criminal Tribunal for Rwanda (Hereinafter "ICTR"). The factors that affect the determination of credibility depend on the standard of corroboration applied by the Trial Chamber. Currently the ICTR is at a crossroads in its decision of whether to apply a strict and "high standard of proof for the prosecution,"[1] or a more conventional standard.[2]

Moreover, the development of South African Law has taken into account the standards set in English and Scottish Law. It continually strives to set reasonable and fair standards in the assessment of witness' testimonies, evidence, and other factors, which are considered when determining the standard of corroboration.

B. Summary of Conclusions

1) *The ICTR must establish a standard of corroboration, which is concurrent with common sense.*

In *Akayesu*, the Trial Chamber noted that the fallibility inaccuracies and contradictions in testimonies are a natural occurrence when dealing with human memory and sight, human characteristics which may allow a witness to easily interpret events

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[1] See email from ICTR Prosecutor, Charles Adeogun, dated September 12, 2001, page 1 [hereinafter ICTR Proscutor's email.] [Reproduced in the accompanying notebook at Tab 1.]

[2] *See id*. [Reproduced in the accompanying notebook at Tab 1.]

differently as time lapses.[3] It would otherwise be unjust to deem that failure to accurately recall an event from memory to be the equivalent of providing false testimony. As the court pointed out in *Akayesu*, the essential factor to prove that the witness has provided the court with false testimony, is assessment of the *mens rea* element.[4] The Trial Chamber in *Akayesu*, is right on point with the standards of corroboration which it established.

Furthermore, in *Bagilishema*, the Trial Chamber's rigid standard requiring testimonies to be coinciding in details has mistakenly established that the weight of evidence should be determined by the consistency of statements submitted into evidence. In fact, in South Africa, it has been established that the weight of testimonial evidence must be determined in light of its merits and demerits to determine whether the truth has been flushed out despite any inaccuracies.[5]

Presently, the ICTR seems in conflict between the degree of corroboration required for a witness's testimony to be credible. However, the rationale exercised in *Akayesu* is the prevalent standard used by courts around the world. More specifically, the legal systems in South Africa, England and Scotland agree that the determination of whether a standard of corroboration has been met, depends on a number of factors, the

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[3] Judgment, *Prosecutor v. Akayesu*, Case No. ICTR-94-4-T (Sept. 2, 1998), par. 140. http://www.itcr.org/ENGLISH/cases/Akayesu/judgement/akay.001.htm [hereinafter Akayesu Judgment]. [Reproduced in the accompanying notebook at Tab 2].

[4] *Akayesu* Judgment, paragraph 140 [Reproduced in the accompanying notebook at Tab 2].

[5] *S .v Sauls and Others,* 1981 (3) SA 172 (A) at 180E-G. [Reproduced in the accompanying notebook at Tab 3.] *See also* 1 MICHAEL P. SCHARF AND VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 572 (1998). [Reproduced in the accompanying notebook at Tab 4.]

context in which the evidence is submitted, and the degree to which the standard will be met.

2) Standards and procedures the ICTR should apply in its determination as to whether the standard of corroboration has been met.

The key element in determining what evidence may be admissible in an attempt to corroborate a witness's testimony lies in the Trial Chamber's acknowledgment that no one rule or doctrine of law can account for every factual situation that may arise in a case.[6] Such foresight may be adopted by recognizing a "common sense" standard which other courts apply in their assessment of what degree of weight should be assigned to evidence submitted before the court.[7] More importantly, in order to determine whether the standard of corroboration has been met, the court needs to address the following: (a) whether the evidence is admissible, (b) to what degree does supporting evidence if any need to be presented to the court to determine the witness' credibility, and (c) whether the evidence submitted confirms by some material particulars that the offence charged was committed by the accused.[8] The standard of corroboration which the Trial Chamber establishes, must enhance the Trial Chamber's ability to combine its discretion and common sense when determining whether the evidence is relevant, truthful and contains some weight.

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[6] See *Banana v. State,* (2000) 8 BHRC 345 (Zim). [Reproduced in the accompanying notebook at Tab 5.]

[7] *See R v. P,* (1991) 3 All E.R. 337 (Eng). [Reproduced in the accompanying notebook at Tab 6.]

[8] *See* ICTR Prosecutor's email. [Reproduced in the accompanying notebook at Tab 1.]

a) Evidence must be admissible in itself.

The scale on which probative value of evidence will be weighed will depend on the discretion of the court.[9] Consequently, there is no one method of assigning probative value to evidence since the circumstances under which such evidence may develop can vary. Accordingly, the assessment of evidence must be established on a case by case basis.[10] Otherwise, such extreme restrictions would establish an unjustified principle of excluding evidence-having prejudice towards the accused although its probative value can defeat the taint of prejudice.

Following the examples of South African and English Law, the Trial Chamber should be able to recognize that the very fact that similar fact evidence is held to be admissible should reiterate the fact that its probative value was the reason for its admissibility.[11] Moreover, judges should not be so quick to dismiss testimony that is not the exact mirror image of the previously stated facts in a witness's prior statement, or in comparison to another witness's testimony. The discretion, with which the Trial Chamber has been empowered,[12] should provide it with the necessary tools to adduce the weight of

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[9] DAVID HUME, COMMENTARIES OF THE LAW OF SCOTLAND RESPECTING CRIMES, at 384 (4th ed.) vol. 2, (Edinburgh, Bell & Bradfute, 1844). [Reproduced in the accompanying notebook at Tab 7.]

[10] *See id.* [Reproduced in the accompanying notebook at Tab 7.]

[11] *See DPP v. Kilbourne,* (1993) 1 All E.R. 440 (Eng.). [Reproduced in the accompanying notebook at Tab 8.] *See also R v. H,* (1995) All E.R. 865. [Reproduced in the accompanying notebook at Tab 9.]

[12] *See* 1 MICHAEL P. SCHARF & VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA at 572 (1998). [Reproduced in the accompanying notebook at Tab 4.]

similar fact evidence. The admissibility of similar fact evidence does not turn on the repetitive consistency of the testimony, but on whether it contains any probative value.[13]

b) <u>The trier of fact although not required by law, should always seek corroboration to support the evidence, which is being submitted in support of allegations made at trial.</u>

Although not required by law, the trier of fact should always seek corroboration to support the evidence, which is being submitted in support of allegations made at trial. The South African rule against self-corroboration seems to be in agreement with the additional requirements that should be placed on single-witness evidence. The courts of South Africa have balanced the safe guards against assessing single-witness testimony by allowing support for witnesses testimony to be accomplished by taking into account other facts and circumstances. Although South African Law does not require corroboration of a single-witness' testimony,[14] it encourages the trier of facts to seek out corroboration in order to maintain a delicate balance between caution and a fair trial for both the complainants and the accused. However, it is for the trier of facts to also use her discretion as to what degree of corroboration if any is required depending on the underlying circumstance and facts of a case.

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[13] *See DPP v Kilbourne,* (1993) 1 All E.R. 440 (Eng). [Reproduced in the accompanying notebook at Tab 8.]

[14] PJ SCHWIKKARD, A ST Q. SKEEN, & S.E. VAN DER MERWE, ET A.L., PRINCIPLES OF EVIDENCE, at 372 (Juta & Co. Ltd. 1997). [Reproduced in the accompanying notebook at Tab 10.]

c) There are three factors that the Trial Chamber needs to address when trying to determine whether the evidence submitted confirms by some material particulars that the offence charged was committed by the accused. The three factors are: (a) the Trial must establish the standard of caution; (b) cautionary standards must be established in light of the standards set forth by single-witness evidence; and (c) the Trial Chamber must look at the totality of the circumstantial evidence.

The Trial Chamber in determining whether the evidence confirms by some material particulars that the offence charged was committed by the accused, should first establish a standard of caution and then look at the totality of the circumstantial evidence. However, what should be deduced from the evolution of South African Law dealing with cases of sexual assault, is that caution should not "displace the exercise of common sense."[15] Moreover, while corroboration is not a prerequisite to accepting the evidence of a single witness, the caution of the Trial Chamber may be satisfied by any factors establishing that the witness' story was not concocted and which concurrently add weight to the credibility of the witness. [16] The basic nature of the single-witness "rule" should not be applied as a rule of law, but as a rule of common sense when assessing the credibility of a single-witness in light of precautionary issues.[17]

[15] *S v. Artman,* 1968 (3) SA 339 (A) at 341B. [Reproduced in the accompanying notebook at Tab 11.]
S v. Chouhan, 1987 (2) SA 315 (ZS) at 316J-318A. [Reproduced in the accompanying notebook at Tab 12.]
R v J, 1966 (1) SA 88 at page 90. [Reproduced in the accompanying notebook at Tab 13.]
See also S v. Snymam, 1968 (2) SA 582 (A) at 585G. [Reproduced in the accompanying notebook at Tab 14.]

[16] *See Banana .v State*. [Reproduced in the accompanying notebook at Tab 5.]

[17] W.A. JOUBERT, THE SOUTH AFRICAN LAW OF EVIDENCE, at 575 (Butterworths Durban 1996 vol. 9). [Reproduced in the accompanying notebook at Tab 15.]

Furthermore, inflexible and extremely restrictive standards should not be applied as the standard rule of thumb in ensuing cases. The Trial Chamber needs to look at the totality of the circumstantial evidence before coming to a determination of whether the evidence establishes that the witness is stating the truth. If the witness is held to be telling the truth or some truths, determining the weight of the truthful statements should help the court in its decision as to whether to convict. Mere inaccuracies however, should not be an excuse to so easily dismiss evidence, which may have some, the least probative value.

Whether the Trial Chamber decides to apply a strict or a less restrictive standard of admissibility of testimonies, will have a profound effect on the outcome of future trials. Ultimately, the question is still whether the requisite of standard of proof (in criminal cases proof beyond a reasonable doubt) has been satisfied.[18]

[18] *See S v. Artman,* 1968 (3) SA 339, at 341 (B). [Reproduced in the accompanying notebook at Tab 11.] *See also S v. D, 1992* (1) SA 513 (Namibia). [Reproduced in the accompanying notebook at Tab 16.]

II. FACTUAL BACKGROUND

A. The Prosecutor v. Ignace Bagilishema

In *The Prosecutor v. Ignace Bagilishema*, the Trial Chamber's assessment of factual "irregularities" established a standard of corroboration requiring the evidence presented to be "coinciding in detail" and "mutually corroborative."[19] The chamber held that "the testimonies of witnesses AB and O, although similar in broad outline, do not coincide in detail."[20] The Chamber therefore held that "the credibility of the two witnesses had been questioned."[21] Consequently, the Trial Chamber dismissed the testimonial evidence for lack of corroboration.

B. Prosecutor v. Jean Paul Akayesu

In *The Prosecutor v. Jean Paul Akayesu*, the Trial Chamber acknowledged that "for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements made to the Prosecutor and the Defence." The Chamber further noted that "this alone is not a ground for believing that the witnesses gave false testimony. Indeed, an often levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human

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[19] Judgment, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T (June 7, 2001),. http://www.ictr.org/English/cases/Bagilishema/judgment/5d.htm, (visited November 28, 2001) [hereinafter Bagilishema Judgment]. [Reproduced in the accompanying notebook at Tab 17.]

[20] *id.,* see par. 750. [Reproduced in the accompanying notebook at Tab 17.]

[21] *id*. [Reproduced in the accompanying notebook at Tab 17.]

characteristics which often deceive the individual, this criticism is to be expected."[22] Accordingly, the Trial Chamber determined the testimonial evidence carried sufficient weight and deemed it admissible.

C. Definitions

Corroboration "is evidence which confirms or supports a fact of which other evidence is given.[23] Corroboration is also defined as "evidence which renders the *factum probandum* more probable by strengthening the proof of one or more facta probantia."[24] "Evidence, which is merely consistent with facts, which are not in dispute, cannot be described as corroboration: corroborative evidence must have a bearing on facts, which are in dispute."[25] Black's Dictionary's definition of corroboration states:

> Confirmation or support by additional evidence or authority <corroboration of the Witness's testimony>.[26]

In essence, the corroboration of a witness's testimony may be established, where the following elements are present:

a) The evidence must be admissible in itself;

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[22] *Akayesu* Judgment, par. 140. [Reproduced in the accompanying notebook at Tab 2.]

[23] *S v. B,* 1976 2 SA 54 (C) 59. [Reproduced in the accompanying notebook at Tab 18.] *See also* PJ SCHWIKKARD ET AL., PRINCIPLES OF EVIDENCE, at 57 (Butterworths Durban 1996 vol. 9). [Reproduced in the accompanying notebook at Tab 9.]

[24] *Popovic v. Derks,* 1961 V.R. 413. [Reproduced in the accompanying notebook at Tab 19.] *See also* PJ SCHWIKKARD ET AL., PRINCIPLES OF EVIDENCE, at 57 (Butterworths Durban 1996 vol. 9). [Reproduced in the accompanying notebook at Tab 10.]

[25] *R v. P,* 1957 3 SA 444 (A) 454. [Reproduced in the accompanying notebook at Tab 6.] *See* PJ SCHWIKKARD ET AL., PRINCIPLES OF EVIDENCE, at 57 (Butterworths Durban 1996 vol. 9). [Reproduced in the accompanying notebook at Tab 10.]

[26] BLACK'S LAW DICTIONARY 348 (7th ed. 1999). [Reproduced in the accompanying notebook at Tab 20.]

b) The evidence must originate from a source, which is independent of the evidence required to be corroborated; and
c) The evidence must tend to show by confirmation of some material particulars that the offense charged was committed and was committed by the accused or his subordinates. [27]:

While the ICTR is not bound by rules of national evidence,[28] having such a vast scope of discretion and little structure to work from, impedes the Trial Chamber's ability to set reasonable standards for corroboration. Particularly critical is the ICTR's assessment of witness testimony, which plays a greater role than once held before the Nuremberg Tribunal that dealt with a meticulous "paper trail" as evidence.[29] Case in point, Durward V. Sandifer captured the essence of an international tribunal's shortcoming when he stated that the scope of discretion which international tribunals are afforded could actually become a handicap by stating that:

> It has been persuasively argued that the very fact of liberality in the admission of evidence "makes it all the more incumbent upon the parties to observe and upon the Tribunal to apply those laws of logic, those principles of general jurisprudence, and those of general assumptions regarding the conduct of men which are common to every system of law."[30]

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[27] *See* Prosecutor's email. [Reproduced in the accompanying notebook at Tab 20.]

[28] See 1 MICHAEL P. SCHARF & VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 564 (1998). [Reproduced in the accompanying notebook at Tab 21.]

[29] *See id.* at 571. [Reproduced in the accompanying notebook at Tab 21.]

[30] DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS, at 20. (University Press of Virginia Charlottesville, Revised ed. 1975). (quoting The Norwegian Claims Case (United States v. Norway), 1921, COUNTER CASE OF THE UNITED STATES 4 1922 (discussing the power of a tribunal which although each has its own rules of procedure, should focus more of substantive law rather than relying on its rules of procedure, particularly in when evaluating evidence). [Reproduced in the accompanying notebook at Tab 22.]

In other words, the tribunal may allow the admissibility of any relevant evidence, which it deems to have probative value.[31] However, such vast power of discretion is available as long as the Tribunal stays within the requisite of a fair trial.[32] Consequently, the Trial Chamber's conservative interpretation of a fair trial is inhibiting the ICTR from benefiting from its vast power of discretion.

[31] *Akayesu Judgment*, par. 133, 136. [Reproduced in the accompanying notebook at Tab 2.]

[32] See Rules of Evidence and Procedure of Rwanda, Rule 89, reproduced in 1 MICHAEL P. SCHARF & VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 564, 565 (1998). [Reproduced in the accompanying notebook at Tab 21.]

III. LEGAL DISCUSSION

A. Evidence must be admissible in itself.

1) South African courts have set standards for the admissibility of similar fact evidence by relying on English Law of Similar Fact Evidence.

First, the greatest challenge the courts face is determining the admissibility of similar fact evidence which is inherently prejudicial towards the accused. Similar fact evidence is defined as "evidence, which establishes that an accused committed other crimes, and if true, so probative of the crime of which he is accused that fairness and common sense demand that it is admitted."[33] Furthermore, the probative value of similar fact evidence derives from the combination of various testimonies that together provide some degree of corroboration for each other, but which would otherwise be dismissed for lack of probative value if made independently.[34] Moreover, the determining factors of the admissibility of similar fact evidence depends on whether: 1) the probative value of the evidence outweighs the prejudicial effects, and 2) whether there is a risk of contamination

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[33] Lord Griffiths establishing the meaning of similar fact evidence as per *R v. P,* (1991) All E.R. 337 (Eng)., in his opinion in *R v. H*, (1995) All E.R. 865, at 13 (Eng). [Reproduced in the accompanying notebook at Tab 9.]

[34] *R v Sims*, was an appeal from a conviction varying on a number of charges from rape, attempted rape, buggery, and assault. The complainants were four prostitutes, half of which were from one town and the other half from another, and a fifth prostitute which submitted evidence of rape on the basis of "similar fact evidence. The Court of Appeal (Criminal Division), allowed the appeal on two counts based on it's observation that the judge had failed to direct the jury the issue of lack of corroboration, and then dismissed other counts. See *R v Sims* (1946) K.B. 531 at p 540. [Reproduced in the accompanying notebook at Tab 23.]

by collusion.[35] The standard of admissibility set by the court is crucial because of its effects on the case at hand and the precedent set for future trials.

In South Africa, courts relying on English law found that similar facts must have a "striking similarity" in order to have significant probative value and therefore be admissible.[36] This strict standard was established in *Boardman v DPP,* an appeal from a conviction which was based on the testimony of two pupils, 16 and 17 years of age, charging their headmaster with (homosexual) sexual misconduct and incitement to commit sexual misconduct.[37] The court held that because of the "striking similarity" of the crimes described in the two witnesses' testimonies, the testimonies would be admissible as similar fact evidence.[38] The evidence which corroborates that the accused committed the very acts he was charged with will be admissible, regardless of the fact that the evidence would also corroborate that other criminal conduct not at trial were also

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[35] *See R v. P*. [Reproduced in the accompanying notebook at Tab 6.] *See also R v H*. [Reproduced in the accompanying notebook at Tab 6.]

[36] *Boardman v. DPP* (1974) All E.R. 887 at 879, (Eng). [Reproduced in the accompanying notebook at Tab 24.] *See also S v. Ngara, 1987* (1) Z.L.R. 91 at 100. [Reproduced in the accompanying notebook at Tab 25.] *S v. Mupah,* 1989 (1) Z.L.R. 279 at 284. [Reproduced in the accompanying notebook at Tab 26.] *S v. Mutsinzinri,* 1997 (1) Z.L.R. 6 at 23. [Reproduced in the accompanying notebook at Tab 27.]

[37] *Boardman v. DPP,* (1974) All E.R. 887 (Eng). [Reproduced in the accompanying notebook at Tab 24.]

[38] *See Id.* [Reproduced in the accompanying notebook at Tab 23.]

committed.[39] Although this may have seemed as giving the court broader discretion when dealing with similar fact evidence, it was actually more restrictive.

In essence, the requirement that similar fact evidence be of "striking similarity" set a high and inflexible standard. The court erroneously limited the scope of circumstances under which similar fact evidence could be admissible by focusing on the similarity of the criminal conduct, rather than emphasizing the significance of an allegation of another crime which provided probative value in support of the claimant's assertions before the court.[40] If the court tailors the admissibility of similar fact evidence so narrowly, it would be overlooking the fact that crimes could be less than strikingly similar, yet provide some if not significant amount of probative value to the allegations being made.[41] On the other hand, similar fact evidence could meet the requirement of striking similarity yet provide no probative value.[42]

In contrast, in recent English cases, the courts have established that such high standards of "striking similarities" are simply too restrictive.[43] Contrary to *Boardman*, in *R v P*, such a high standard of scrutiny of similar fact evidence although accepted as a "basic principle,"[44] was discredited as a prerequisite to admissibility."[45] In essence, the

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[39] *See R v. H*. [Reproduced in the accompanying notebook at Tab 9.]

[40] *See Banana v. State, (*where the court explained its rationale for disagreeing with the court's decision in *Boardman v. DPP).* [Reproduced in the accompanying notebook at Tab 5.]

[41] *See id.* [Reproduced in the accompanying notebook at Tab 5.]

[42] *See id.* [Reproduced in the accompanying notebook at Tab 5.]

[43] *See R v P*. [Reproduced in the accompanying notebook at Tab 6.]

[44] *S v. D*, 1991 (2) SACR 543 at 546. [Reproduced in the accompanying notebook at Tab 28.]

test of admissibility should not focus solely on the similarity of the conduct, but rather on whether there is sufficient relation between the evidence of one victim to provide support for the other victim and whether the probative value of the evidence outweighs the prejudicial effects.[46] Consequently, the very fact that similar fact evidence is held to be admissible should reiterate the fact that its probative value was the reason for its admissibility. Otherwise, in an attempt to appease the restrictive standards of "striking similarity," the court could easily dismiss evidence containing sufficient weight.

However, similar to the court's holding in *Boardman*,[47]the Trial Chamber in *Bagilishema[48],* set a high standard of corroboration. In *Bagilishema*, the Trial Chamber disregarded witnesses' testimonies by holding that the testimonies given by the witnesses did not as the court said, coincide in detail and were not found to be mutually corroborative. [49] Nevertheless, the fact that the testimonies were admissible in the first place, suggests that the court did not apply the high standard of "striking similarities"

S v. M, 1995 (1) SACR 667 at 692). [Reproduced in the accompanying notebook at Tab 29.]

[45] *In R v. P,* the defendant was charged with the rape and incest of his two daughters over along period of time. Although there was one of the issues was the risk of contamination by collusion, since both girls lived under the same roof, the court held the there was sufficient relation of the evidence of one victim to provide support for the second victim. The court recognized that the probative value of the evidence outweighed the prejudicial effects of its admissibility. *See R v. P* [1991] 3 All E.R. 337 (Eng). [Reproduced in the accompanying notebook at Tab 6.]

[46]See *id.* at 346. [Reproduced in the accompanying notebook at Tab 6.]

[47] *See DPP v. Boardman.* [Reproduced in the accompanying notebook at Tab 23.]

[48] *Bagilishema* Judgment. [Reproduced in the accompanying notebook at Tab 17.]

[49] *Bagilishema* Judgment, paragraph 716. [Reproduced in the accompanying notebook at Tab 17.]

when determining whether the testimonies would be admissible as similar fact evidence. Consequently, the similar fact evidence was admissible because the Trial Chamber believed that despite prejudicial effects, the probative value of the testimonies outweighed the prejudice.[50] If the testimonies were deemed to have significant probative value, then the Trial Chamber erred in applying such a high standard of corroboration and dismissing the testimonies in light of a few inaccuracies.

It should be noted that the scale on which probative value of evidence will be weighed will be depend on the discretion of the court.[51] Consequently, there is no one method of assigning probative value to evidence since the circumstances under which such evidence may develop can vary greatly. Accordingly, the assessment of evidence must be established on a case by case basis.[52] Otherwise, such extreme restrictions would establish an unjustified principle by excluding evidence-having prejudice towards the accused notwithstanding that its probative value could defeat the taint of prejudice.[53]

An international tribunal's broad range of discretion[54] may sometimes undermine the ultimate purpose of that freedom. While the Trial Chamber is concerned about an

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[50] In *R v. H*, Judgement 1 by Lord Macky's commented that if a court decides that similar fact evidence is inadmissible, then its because the evidence bares no probative value. *See R v. H.* [Reproduced in the accompanying notebook at Tab 9.]

[51] DAVID HUME, COMMENTARIES OF THE LAW OF SCOTLAND RESPECTING CRIMES, RESPECTING CRIMES at 384 (4th ed.) vol. 2, (Edinburgh, Bell & Bradfute, 1844). [Reproduced in the accompanying notebook at Tab 7.]

[52] *See id.* [Reproduced in the accompanying notebook at Tab 7.]

[53] See *R v. P.* [Reproduced in the accompanying notebook at Tab 6.]

[54] See also 1 MICHAEL P. SCHARF AND VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 564 (1998). [Reproduced in the accompanying notebook at Tab 21.]

unfair trial by holding an innocent person guilty of a crime they did not commit,[55] it would also be as unfair to exclude similar fact evidence of such great probative value simply because of its propensity for prejudice. In the end, "the concept of admissibility turns on probative weight which, like the question of corroboration, is a matter of logic and common sense, and not of legal doctrine."[56]

2) *Similar Fact Evidence is admissible regardless if there is a general risk of contamination by collusion.*

Another issue that arises when dealing with similar fact evidence is the risk of contamination by collusion.[57] Contamination by collusion occurs when witnesses make a conscious effort to concoct a story, or may also occur when a witness is influenced by another witness, but on an unconscious level.[58] Most importantly, the court needs to

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[55] ROBERT S. CLARK & MADELEINE SANN, THE PROSECUTION OF INTERNATIONAL CIRMES at 326 (Transaction Publishers1996). [Reproduced in the accompanying notebook at Tab 30.]

[56] *See Banana v. State* (2000) 8 B.H.R.C. 345 (Zim). [Reproduced in the accompanying notebook at Tab 5.]

[57] Collusion by definition is "an agreement to defraud or to obtain something forbidden by law, BLACK'S LAW DICTIONARY 259 (7th ed. 1999). [Reproduced in the accompanying notebook at Tab 31.]

[58] In *R v. H* the defendant appealed from convictions based on charges of sexual offenses made towards his adopted daughter and stepdaughter over a period of three years. The issue of collusion arose because both first complained to them the defendant's wife, both girls had also had the opportunity to discuss the matter between the two of them. The defendant appeal was based on his claim that there had existed a risk of collusion. The Court of Appeals dismissed the appeal holding that if there had been a real possibility of collusion, the judge would have held the similar fact evidence to be inadmissible, otherwise the risk of collusion would only affect the probative weight of the evidence. In addition, the Court reaffirmed that the judge was correct in allowing the determination of credibility and whether the evidence could be used as corroboration, up for the jury to

determine whether the risk of contamination by collusion should affect the admissibility of similar fact evidence.

First, in *R v H*, the court held that the admissibility of evidence should be decided regardless of whether there was an issue of contamination by collusion.[59] The decision to admit similar fact evidence establishes that there is a significant relationship between the crimes.[60] Furthermore, when similar fact evidence is deemed admissible all that has been established is that the evidence has sufficient probative value, but no determination has been made by the court that it is accepted to be true.[61] Whether a witness's testimony is credible is for the jury to decide[62] after the jury has had an opportunity to hear each testimony and assess the demeanor of each witness.

However, if there is a real risk of collusion then it is up to the judge to hold that the similar fact evidence is inadmissible. [63] If the evidence has been contaminated by collusion, then the judge must further hold that there can be no mutual corroboration between the similar fact evidence.[64] Similarly the Trial Chamber, must also acknowledge

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decide. See *R v. H,* (1995) 2 All E.R. 865(Eng). [Reproduced in the accompanying notebook at Tab 9.]

[59] *See id.* [Reproduced in the accompanying notebook at Tab 9.]

[60] See *R v. P*. [Reproduced in the accompanying notebook at Tab 6.]

[61] *See R v. H*. [Reproduced in the accompanying notebook at Tab 9.]

[62] *See id.* [Reproduced in the accompanying notebook at Tab 9.]

[63] *R v. Ananthanaryanan,* (1997) 2 All E.R. 847 (Eng). [Reproduced in the accompanying notebook at Tab 33.]*See also R v H*. [Reproduced in the accompanying notebook at Tab 31.]
See also DPP v. Kilbourne, (1993) 1 All E.R. 440 (Eng). [Reproduced in the accompanying notebook at Tab 8.]

[64] *See R v. Ananthanaryanan*. [Reproduced in the accompanying notebook at Tab 31.]

that the possibility of unconscious collusion, may also be determinative as to whether the evidence can be held mutually corroborating.[65] Although there will always be a general risk of collusion in similar fact evidence, a general risk should not affect the admissibility of similar fact evidence when determining whether the evidence is reliable.[66]

Moreover, in *DPP v Kilbourne,* the court held that it was "immaterial" whether similar fact evidence was mutually corroborative, what was more important was whether the evidence of the second group of witnesses was admissible to support the charges made by the first group of witnesses accusing the defendant of committing the crimes with which he was accused.[67] However, more importantly was the court's holding that the evidence of the second group of witnesses could be held as corroboration of the first group's claims if the evidence was deemed credible.[68] Accordingly, although it will be common for there to be a risk of collusion, once similar fact evidence has been held to be admissible, it should then be used to assert the truth and if credible, to serve as corroboration. [69]

Following the examples of South African and English Law, the Trial Chambers should be able to recognize that the fact that similar fact evidence was held admissible in

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[65] *R v. Ryder* at 879, 880. [Reproduced in the accompanying notebook at Tab 32.]

[66] *See R v. Ryder.* [Reproduced in the accompanying notebook at Tab 32.]

[67] *DPP v Kilbourne,* dealt with an appeal by the prosecution, where the accused was charged with sexual offences (homosexual conduct), against two different groups of boys. The incidents took place about a year apart. *DPP v Kilbourne,* (1993) 1 All E.R. 440 (Eng). [Reproduced in the accompanying notebook at Tab 8.]

[68] *See id.* [Reproduced in the accompanying notebook at Tab 8.]

[69] *See id.* [Reproduced in the accompanying notebook at Tab 8.]

the first place, signifies that the evidence has probative value.[70] Moreover, the Trial Chambers should not be so quick to dismiss testimony that is not the exact mirror image of the previously stated facts in a witness's prior statement testimony, or in comparison to another witness's testimony. The discretion, with which the tribunal has been empowered,[71] should provide it with the necessary tools to adduce the weight of similar fact evidence. The admissibility of similar fact evidence does not turn on the repetitive consistency of the testimonies, but on whether it contains any probative value.[72]

B. The trier of fact, although not required by South African Law, should always seek corroboration to support the evidence, which is being submitted in support of allegations made at trial.

The trier of fact, although not required by South African Law, should always seek corroboration to support the evidence, which is being submitted in support of allegations made at trial.[73] The general rule against self-corroboration in South African Law establishes a safeguard by requiring that an independent source of corroboration should be applied with the exception of two situations. Exceptions to the rule against self-corroboration arise when: (1) the injuries suffered after a violent offence may of

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[70] *Supra note* 3. [Reproduced in the accompanying notebook at Tab 2.]

[71] *Supra note* 28. [Reproduced in the accompanying notebook at Tab 21.]

[72] *See DPP v Kilbourne.* [Reproduced in the accompanying notebook at Tab 8.]

[73] PJ SCHWIKKARD ET AL., PRINCIPLES OF EVIDENCE at 57 (Butterworths Durban 1996 vol. 9). [Reproduced in the accompanying notebook at Tab 10.]
See R v. P, comparing Scottish law's requirement of corroboration in criminal cases and English, law which does not. [Reproduced in the accompanying notebook at Tab 6.]

themselves reflect corroboration;[74] and (2) when others observe the emotional distress suffered by a victim soon after the incident occurred. [75]

However, the application of this general rule and its exceptions should always be tailored to fit the facts of the situation.[76] Moreover, it is important that the two exceptions to the self-corroboration rule be established with careful observation of the context in which they are applied. For example a court should question and affirm whether the injuries where self-inflicted or whether the distress was caused because of the incident the offence in dispute and that there is no other explanations for the complainant's exhibited behavior of distress or injury.[77]

The essence of the rule against self-corroboration was promulgated in *Director of Public Prosecutions v. Kilbourne*, as:

> There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular

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[74] *See R v. Trigg,* (1963) 1 All E.R. 490 (Eng.). [Reproduced in the accompanying notebook at Tab 34.]

[75] *See R v. Redpath,* 1962 46 C.R. App. R 319 (Eng). [Reproduced in the accompanying notebook at Tab 35.] *See Yates v. HM Advocate,* 1997 S.L.T. (Notes) 42 (Scot.). Scottish landmark case establishing that a victim's distress can be a form of corroboration if followed soon after a sexual offense. *Yates,* was also distinguished because in addition to the victim's distress, the identity of the accused was established by the accussed's own admission to particpating in sexual conduct with the victim. The court held that although the victim's distress can be corroborated by the testimony of others who observed the distress, the identity of the accused could not be corroborated by the victim's distress alone. [Reproduced in the accompanying notebook at Tab 36.]
R v. Knight, 1966 1 W.L.R. 230 (Eng). [Reproduced in the accompanying notebook at Tab 37.]

[76] The trier of fact needs to determine whether the witness is telling the truth about how the injuries were incurred, that they were not self-inflicted and the distress is a result of the offense rather from some other source. PRINCIPLES OF EVIDENCE, page 373. [Reproduced in the accompanying notebook at Tab 10.]

[77] *See id.* [Reproduced in the accompanying notebook at Tab 10.]

> statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits the in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstance with which it fits in. We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements we should not accept them as corroborative. *And the law says that a witness cannot corroborate himself*. In ordinary affairs we are often influenced by the fact that the maker of the doubted statement has consistently said the same thing ever since the event described happened. But the justification for the legal view, must I think, be that generally it would be too dangerous to take this into account and therefore it is best to have a universal rule.[78]

The evidence of corroboration need not be direct from another eyewitness, but may also be indirect depending on the facts and circumstances.

In other words, apart from the two exceptions against self-corroboration stated in South African Law, corroboration could also be obtained from circumstantial evidence which may arise in a myriad of situations. Circumstantial evidence may arise from testimony, a set of events or circumstances from which a statement in question can be corroborated to be true or unreliable.[79] Since the situations in which circumstantial evidence may arise are endless, it is better to analyze each situation on a case by case basis.

Furthermore, for a better understanding of the rule against self-corroboration, South African Law has turned to Scottish Law. Scottish Law requires that there be two witnesses; *nam testis unus supicionem, non fidem facit*.[80] This law derived from the

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[78] *See DPP v. Kilbourne* (emphasis added). [Reproduced in the accompanying notebook at Tab 8.]

[79] *See id.* [Reproduced in the accompanying notebook at Tab 8.]

[80] JOHN BURNETT, A TREATISE ON THE VARIOUS BRANCHES OF THE CRIMINAL LAW OF SCOTLAND CHAPTER XIX at 509(Edinburg, Printed by G. Ramasay for A. Constable, 1811). [Reproduced in the accompanying notebook at Tab 38.]

Jewish and Roman laws from which Scotland continues to enforce the belief that a conviction cannot result from the testimony of a single-witness alone.[81] However, Scottish law also evolved to recognize that this standard of legal proof could also be met if the evidence of a single-witness could be supported indirectly by circumstantial evidence.[82]

In addition, Scottish law went as far as establishing the *Moroov Doctrine*, which permits the admissibility of supporting evidence even when it derives from separate charges other than the ones at trial and from different complainants.[83] The theory of the *Moroov Doctrine*, is that a series of offences occurring under similar circumstances may be so interconnected as to be part of a "course of criminal conduct."[84] In addition, if the

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[81] The Lord Justice General (Rodger) observing the development of Scottish Law specifically on the requirement that more than just a single-witness' testimony for a conviction. *See also Fox v. HM Advocate* 1998 S.L.T. 335 at 339 (Scot). [Reproduced in the accompanying notebook at Tab 39.]

[82] DAVID HUME, COMMENTARIES OF THE LAW OF SCOTLAND RESPECTING CRIMES, RESPECTING CRIMES at 384 (4th ed.) vol. 2, (Edinburgh, Bell & Bradfute, 1844). [Reproduced in the accompanying notebook at Tab 7.] *See Moorov v. HM Advoctate,* 1930 J.C. 68. [Reproduced in the accompanying notebook at Tab 40.]*See Fox v. HM Advocate* 1998 S.L.T. 335 at 339. (Scot). [Reproduced in the accompanying notebook at Tab 39.] Smith v Lee 1997 S.L.T. 690 at p. 696 (Scot). [Reproduced in the accompanying notebook at Tab 41.] JOHN BURNETT, A TREATISE ON THE VARIOUS BRANCHES OF THE CRIMINAL LAW OF SCOTLAND CHAPTER XX (Edinburg, Printed by G. Ramasay for A. Constable, 1811). [Reproduced in the accompanying notebook at Tab 42.] Alison, Sir Archibald, Practice of Criminal Law of Scotland (Edinburgh, W. Blackwood, 1833).). [Reproduced in the accompanying notebook at Tab 43.]

[83] *See Boncza-Tomaszewski v. HM, Advocate* 2000 SCCR 657. [Reproduced in the accompanying notebook at Tab 44.]

[84] *See DPP v Kilbourne*. [Reproduced in the accompanying notebook at Tab 8.]

offences are deemed part of the same criminal conduct, then the evidence has met the standard of corroboration.[85]

Consequently, the South African rule against self-corroboration seems to be in agreement with the additional requirements that should be placed on single-witness evidence. The courts of South Africa have balanced the safeguards against assessing single-witness testimony by allowing support for witnesses testimony to be accomplished by taking into account other facts and circumstances. Although South African Law does not require corroboration of a single-witness' testimony,[86] it encourages the trier of facts to seek out corroboration in the effort to maintain the delicate balance of justice and a fair trial for both the complainants and the accused. However, it is for the trier of facts to also use her discretion as to what degree of corroboration if any is required depending on the underlying circumstance and facts of a case.

[85] *See id.* [Reproduced in the accompanying notebook at Tab 8.]

[86] PJ SCHWIKKARD, A ST Q. SKEEN, & S.E. VAN DER MERWE, ET A.L., PRINCIPLES OF EVIDENCE, at 372 (Juta & Co. Ltd. 1997). [Reproduced in the accompanying notebook at Tab 10.]

C. Evidence submitted at trial must be assessed to determine whether it is sufficient to establish that the accused committed the offence with which she is charged.

There are three factors that the Trial Chambers need to address when trying to determine whether the evidence submitted confirms by some material particulars that the offence charged was committed by the accused. The three factors are as follows: (a) the Trial Chamber must establish the standard of caution; (b) cautionary standards should be established by the standards set forth by single-witness evidence; and (c) the Trial Chamber should look at the totality of circumstantial evidence. Only after these three factors have been taken into account can a court determine whether the evidence submitted at trial has any bearing as to whether the accused committed the offence with which he is charged.

1. The Cautionary Rule, a rule which although outdated, has evolved in recent South African case law.

Over the years, strict standards of caution have been established. The fear of bias, self-interest, or an antiquated theory that certain types of people have a propensity to be unreliable have been replaced with a more reliable standard of corroboration, one based on common sense rather than on an inflexible rule of law. The cautionary rule was established in Roman-Dutch jurisdictions in recognition that certain types of persons were less reliable than others were, particularly when a conviction was attempted based on uncorroborated evidence of a single witness. [87]

[87] *See Banana v. State*. [Reproduced in the accompanying notebook at Tab 5.]

First, the cautionary rule specifically addressed the uncorroborated evidence of sexual complaints, of which the majority of complainants were women.[88]

In *A v Mupfudza*, a landmark case, the court developed a two-prong test which revived the already well-established cautionary rule.[89] The first step was for the court to question whether the complainant was credible, and the second was to determine whether the evidence had been submitted as corroboration of the evidence which the accused had already provided.[90] The cautionary rule thereby established a high standard of corroboration by making a prerequisite that there be evidence supporting the witness's complaint, despite the fact that the witness was already held to be credible.[91] The Courts' rationale for such a rigid cautionary standard was to promote fair trials and prevent the conviction of an innocent standing accused.[92]

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[88] *S v. Jackson,* 1998 (1) SACR 470 at 476. [Reproduced in the accompanying notebook at Tab 45.]

[89] *A v. Mupfudza,* 1982 (1) Z.L.R. 271. [Reproduced in the accompanying notebook at Tab 46.]Holmes JA commenting on the cautionary rule involving sexual assault as requiring "a) the recognition by the court of the inherent danger of the aforesaid: and b) the existence of some safeguard reducing the risk of wrong conviction, such as corroboration of the complainant in a respect implicating the accused or the absence of gainsaying evidence from him, or his mendacity as a witness…." and then later stating his agreement of Maddonald AJP in *R v. J***,** that such an "exercise of caution should not be allowed to displace common sense". *S v. Snyman,* 1968 (2) 582 (A) at 585C-H & replicated in 1998 (4) BCLR 424 (SCA). [Reproduced in the accompanying notebook at Tab 14.]

[90] *See id.* [Reproduced in the accompanying notebook at Tab 14.]

[91] *See Banana v State.* [Reproduced in the accompanying notebook at Tab 5.]

[92] *See also S v. Chyitiyo,* 1989 (2) Z.L.R. 144 at 145. [Reproduced in the accompanying notebook at Tab 47.] *S v. Chigova* 1992 (2) Z.L.R. 206 at 219, 220. [Reproduced in the accompanying notebook at Tab 48.] *S v. Manyanga,* 1996 (2) 331 at 341. [Reproduced in the accompanying notebook at Tab 49.] *S v. Zaranyika,* 1997 (1) Z.L.R. 539 at 555. [Reproduced in the accompanying notebook at Tab 50.]
See Carmell v. Texas, 529 U.S. 513 (This was an Appeal from the conviction of the Court

However, in most recent cases, the courts have held that there lacked a rational basis behind the development of the cautionary rule.[93] Moreover, the court in *S v D*, held that regardless of whether a case was based on a complaint of rape or one of theft, the test should be that of proving guilt beyond a reasonable doubt and nothing more.[94] Recent South African law has deemed that the basis of the cautionary rule was irrational, outdated and based on unjustified stereotypes of complainants (women) in sexual assault cases.[95] In addition, in *S v. J,* the court cited to a United States case which explicitly acknowledged the cautionary rules outlived its antiquated rationale by stating that:

> What ever might have been its historical significance, the disapproved instruction now performs no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other

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of Appeals of Texas, 2nd Circuit, by the Petitioner from a conviction of sexual offenses based on the amended Tex. Code Crim. P. Ann art 38.07 that did not go into affect until after the petitioner committed the offense. The court discussed that the rationale for the requirement of corroboration for sexual assault claims arose when the victim was deemed to be an accomplice, in which case the law would require credible testimony plus corroboration. The courts discussion demonstrates the long history of viewing victims of sexual assaults as untrustworthy). [Reproduced in the accompanying notebook at Tab 51.]

[93] *See S v. D, 1992* (1) SA 513, at 516 A-C (Namibia). [Reproduced in the accompanying notebook at Tab 16.] *See also S v. J,* 1988 (4) BCLR 424 (SCA) (citing P v. Rincon-Pineda and other cases which have deemed the cautionary rule to be outdated and wrongfully discriminatory towards women, by holding that they are more prone to accuse their attacker of sexual assault for spiteful reasons rather than because it's the truth. More importantly, the court acknowledged the burden of proof is beyond a reasonable doubt, especially in sexual assault cases). [Reproduced in the accompanying notebook at Tab 52.] *See also P v. Rincon –Pineda,* 14Cal 3d 864 (1975). [Reproduced in the accompanying notebook at Tab 53.]

[94] *See id. S v D.* [Reproduced in the accompanying notebook at Tab 16.]

[95] *See S v. Jackson,* 1998 (1) SACR 470. [Reproduced in the accompanying notebook at Tab 45.] *S v. M,* 1999 (2) SACR 548. [Reproduced in the accompanying notebook at Tab 54.]

> classes of charges, and those who make such accusation should be deemed no more suspect in credibility than any other class of complaints…….A cautionary instruction bred in circumstances of 17th century criminal rape and criminal justice need not be disinterred in a contemporary California courtroom in order to insure that a defendant faced essentially by a single accuser will not be casually convicted without due process consideration of the relative weight of evidence.[96]

A significant number of courts have since recognized that the requirement of putting an additional burden of an outlived rule on victims of sexual assaults could result in unfair trials for the victims of such cases.[97]

Although it has been recognized in the ICTR's jurisprudence as well as in the precedent of other national courts that charges of rape will not require corroboration,[98] the ICTR's Trial Chamber are still struggling to overcome strict standards of caution that they are enforcing upon themselves. Specifically, the ICTR must overcome the strict requirement that it established in *Bagalishema*, requiring that witness' testimonies must coincide in detail. [99] What should be deduced from the evolution of South African law dealing with cases of sexual assault is that caution should not "displace the exercise of common sense."[100]

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[96] *See S v. J*. [Reproduced in the accompanying notebook at Tab 51] See *P v. Rincon – Pineda, at 260.* [Reproduced in the accompanying notebook at Tab 52.]

[97] *S v. K 2000,* BCLR 405 at 418-419. [Reproduced in the accompanying notebook at Tab 55.]

[98] International Criminal Tribunal for Rwanda; Rules of Evidence, Rule 96 *reprinted in* 1 MICHAEL P. SCHARF AND VIRGINIA MORRIS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 569 (1998). [Reproduced in the accompanying notebook at Tab 21.]

[99] *See Bagalishema* Judgment. [Reproduced in the accompanying notebook at Tab 17.]

[100] *S v. Artman,* 1968 (3) SA 339 (A) at 341B. [Reproduced in the accompanying notebook at Tab 11.] *S v Chouhan,* 1987 (2) SA 315 (ZS) at 316J-318A. [Reproduced in the accompanying notebook at Tab 12.] R v. J, 1966 (1) SA 88 at page 90. [Reproduced in the accompanying notebook at Tab 13.] *See S v. Snyman,* 1968 (2) SA 582 (A) at 585G. [Reproduced in the accompanying notebook at Tab 14.]

2. ***Single Witness Testimony***

The cautionary rules for single witness evidence has always varied according to the rules of the jurisdiction in which a case is being tried. For example, while in Scotland there exist the law of *unis testis*, which literally means, "one witness is no witness,[101]" South African law allows a conviction if the court has found that the evidence from the single witness is credible.[102] A single witness is not limited to a case where there exists only a sole witness, but may also exist when a case has several witnesses, but only one, which will be testifying on point in issue.[103] In this situation, the rest of the witnesses testifying on surrounding issues should not have any bearing on the key witness's credibility.[104] By looking at the elements required for the evidence of a single witness to be credible, a court may adduce what degree of corroboration is required to determine that the offence charged was committed by the accused.

The standard for the evidence of a single witness was first set in *R v Moekoena*, in which it was established that the uncorroborated evidence of a "competent and credible" witness would suffice for a conviction, but only if the "evidence was clear and

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[101] *See Fox v, HM Advocate,* 1998 S.L.T. at 339. [Reproduced in the accompanying notebook at Tab 38.]

[102] *See Banana v. State.* [Reproduced in the accompanying notebook at Tab 5.]

[103] L.H. Hoffman and D. Zeffert, THE SOUTH AFRICAN LAW OF EVIDENCE at 575 (Butterworths, 4th ed.). [Reproduced in the accompanying notebook at Tab 56.]

[104] *See id.* [Reproduced in the accompanying notebook at Tab 56.]

satisfactory in every material way."[105] Many courts soon applied this high standard as the general rule for single witness evidence.[106] The case itself involved the identification of the accused by the single witness who said he had identified the defendant by the light of a pocket torch as he ran past him in the dark.[107] In *Mokoena* such a rigid standard of proof made sense because of the context in which the identification by the single witness was made.

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[105] *See R v. Mokoena,* 1932 OPD 79 at 80. [Reproduced in the accompanying notebook at Tab 57.]

[106] L.H. Hoffman and D. Zeffert, THE SOUTH AFRICAN LAW OF EVIDENCE (Butterworths, 4th ed.). [Reproduced in the accompanying notebook at Tab 56.]

[107] *See R v. Mokoena*. [Reproduced in the accompanying notebook at Tab 57.]

Subsequently, many courts adopted this as the general rule.[108] However, recent cases have criticized *Mokoena* as an incorrect standard of proof for single witness evidence.[109] In *S v Sauls and Others*, Diemont JA made the most poignant critique when he stated that:

> There is no rule of thumb test or formula to apply when it comes to consideration of the credibility of the single witness (see the remarks of Rupff JA in *S v Webber*[110]). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [the first Mokoena case] may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded' (per Schreiner JA In *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham*.[111]) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.[112]

In other words, the dictum of *Mokoena* should be applied as the underlying basis of the standard set in S v Sauls and others, and not as a principal rule.[113]

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108 *R v. Abdoorham*,1954 (3) SA 163 (N) at 165. [Reproduced in the accompanying notebook at Tab 58.]

109 *See id.* [Reproduced in the accompanying notebook at Tab 57.]

110 *S v. Webber,* 1971 (3) SA 754 (A) at 758. [Reproduced in the accompanying notebook at Tab 59.]

111 *R v. Bellingham,* 1995 (2) SA 566 at 758. [Reproduced in the accompanying notebook at Tab 60.]

112 *S v. Sauls and Others,* 1981 (3) SA 172 (A) at 180E-G. [Reproduced in the accompanying notebook at Tab 3.]

113 For example, *R v Mokoena,* 1956 (3) SA 81 (A). [Reproduced in the accompanying notebook at Tab 61.] *R v J,* 1966 (1) SA 88 (RA). [Reproduced in the accompanying notebook at Tab 13.] *S v. Artman,* 1968 (3) SA 339. [Reproduced in the accompanying notebook at Tab 11.] L.H. Hoffman and D. Zeffert, THE SOUTH AFRICAN LAW OF

Furthermore, in Zimbabwe the courts have followed the application of the cautionary rule as set forth in *S v Sauls and Others*.[114] In *S v Nyati*, the court acknowledged that although the evidence of a single witness must be approached with caution, its credibility should be determined by its merits when compared to any factors that may detract from its reliability.[115] Above all, the mere possibility that the single witness may have an interest or a bias against the defendant should not alone preclude a conviction.[116] The essential element to this common sense of approach is whether the court believes beyond a reasonable doubt that the single witness has told the truth, regardless of any inaccuracies.[117]

Moreover, while corroboration is not a prerequisite to accepting the evidence of a single witness, the caution of a court may be satisfied by any factors establishing that the witness's story was not concocted and which concurrently add weight to the credibility of the witness. [118] The basic nature of the single-witness "rule" should not be applied as a

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EVIDENCE at 574 (Butterworths, 4th ed.). [Reproduced in the accompanying notebook at Tab 56.]

[114] *S v. Saul and others.* [Reproduced in the accompanying notebook at Tab 3.]

[115] *S v. Nyati,* 1977 (2) ZLR 315 at 318. *See S v Weber*. [Reproduced in the accompanying notebook at Tab 59.]

[116] *See S v. Nyati*.

[117] *See S v. Nathoo Supermarket (Pvt) Ltd,* 1987 (2) ZLR at 138. For an overview of courts' determination of whether an accused guilt has been proved beyond a reasonable doubt. [Reproduced in the accompanying notebook at Tab 62.] *See R v. Abdoorham* 1957 (3) SA 163 at 165. [Reproduced in the accompanying notebook at Tab 57.] *R v. Mokoena* 1956 (3) SA 81 at 85. [Reproduced in the accompanying notebook at Tab 61.]

[118] *See Banana v State.* [Reproduced in the accompanying notebook at Tab 5]

rule of law, but as a rule of common sense when assessing the credibility of a single-witness in light of precautionary issues.[119]

3. Assessing circumstantial evidence submitted at trial.

Circumstantial evidence is evidence which provides inferences of facts of a case that are in dispute and which may be used in distinguishing the truth.[120] The standard of proof was set in *R v Bom*, which established that "a) the inference sought to be drawn must be consistent with all the proved facts;" and "b) that the facts should be such that they exclude every reasonable inference from them save the one to be drawn."[121] Furthermore, the court should be cautioned from relying too heavily on untruthful statements that should not have any bearing on the guilt of the accused.[122] Rather, untruthful statements should affect weight of the evidence in light of the circumstances of each case.[123]

In addition, the court should apply the rules with the acknowledgment that a determination of the facts must be made from the totality of the circumstances and not a

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[119] L.H. Hoffman and D. Zeffert, THE SOUTH AFRICAN LAW OF EVIDENCE at 575 (Butterworths, 4th ed.). [Reproduced in the accompanying notebook at Tab 56.]

[120]W.A. JOUBERT, THE LAW OF SOUTH AFRICA, at 449 (Butterworths Durban 1996 vol. 9). [Reproduced in the accompanying notebook at Tab 15.]

[121] *R v. Bom,* 1939 AD 188 202-203. [Reproduced in the accompanying notebook at Tab 63.] *See S v. Mtsweni,* 1985 (1) SA 590 (A). [Reproduced in the accompanying notebook at Tab 64.]

[122] *See S v. Mtsweni,* 1985 (1) SA 590 (A). [Reproduced in the accompanying notebook at Tab 64.]

[123] *See id.* [Reproduced in the accompanying notebook at Tab 64.]

determination from facts that are reviewed in "isolation."[124] Since evidence must weighed as a whole,[125] the court must also take into account the demeanor of the witnesses, the extent to which there exists or lacks any interest or bias, inconsistencies or contradictions and the reliability of the testimony itself.[126] The variables taken into account in the assessment of evidence, therefore, create a delicate balance which can only be established taking every testimony, and evidence of fact into consideration as whole.

David Walker, described this balance between the assessment of the evidence and determining its weight in his analysis of Scottish law when he said:

> It involves deciding which witnesses are honest, which lying, which exaggerating, which confused, or inaccurate, or forgetful, which truthful, accurate and reliable, and trying to build up from the whole body of evidence a coherent picture of what happened. This involves accepting some evidence, discarding some and trying to piece it all together. There may be gaps in the evidence, things not observed, period as to which there is silence and so on, and questions may arise of how fare a judge can draw an inference from incomplete evidence.[127]

Accordingly, the trier of fact must take into consideration evidence as a whole in order to determine the truth of the matter asserted by the witness.[128]

Inflexible and extremely restrictive standards should not be applied as the standard rule of thumb in ensuing cases. The ICTR's Trial Chambers need to look at the

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[124] *S v. Snyman, 1968* 2 SA 582 (A) 589. [Reproduced in the accompanying notebook at Tab 14.]

[125] *See id. S v. Snyman.* [Reproduced in the accompanying notebook at Tab 14.]

[126] PJ SCHWIKKARD, A ST Q. SKEEN, & S.E. VAN DER MERWE, ET A.L., PRINCIPLES OF EVIDENCE, at 371 (Juta & Co. Ltd. 1997). [Reproduced in the accompanying notebook at Tab 10.]

[127] DAVID M. WALKER, THE SCOTTISH LEGAL SYSTEM (W. Green/Sweet & Maxwell 6th ed., Revised 1992), at 514. [Reproduced in the accompanying notebook at Tab 65.]

[128] *S v. Zitha,* 1993 1 SACR 718 (A) 720*i* –721*a*. [Reproduced in the accompanying notebook at Tab 66.]

totality of the circumstantial evidence before coming to a determination of whether the evidence establishes that the witness is stating the truth. If the witness is held to be telling the truth or some truths, determining the weight of the truthful statements should help the Trial Chambers in their decision as to whether to convict. Mere inaccuracies however, should not be an excuse to so easily dismiss evidence, which may have the least probative value.